

NTSB Order No. EA-3945

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 22nd day of July, 1993

Respondent .

Docket SE-11093

## 6100

certificate for 90 days based on allegations that he made a low pass over an active runway at Ogden-Hinkley Airport in Ogden, Utah, at an altitude of less than 100 feet and at an airspeed in excess of 300 knots, after he had been authorized by air traffic control (ATC) to make the pass at or below 200 knots. The law judge found that, in so doing, respondent violated 14 C.F.R. 91.70(a) [unauthorized operation below 10,000 feet MSL at an indicated airspeed of more than 250 knots], 91.70(b)(2) [unauthorized operation within an air traffic area at an indicated airspeed of more than 200 knots], 91.75(b) [operation contrary to an ATC instruction], and 91.9 [careless or reckless operation].<sup>2</sup>

On appeal, respondent does not dispute the law judge's factual findings, nor does he deny that he violated the above-cited regulations in the manner described. However, he argues that this case should be dismissed because the FAA has never published in the Federal Register, or promulgated through notice and comment rulemaking procedures, its "policy" of suspending airman certificates as a penalty for violating the Federal Aviation Regulations (FAR), or the fact that it has "interpreted" the Federal Aviation Act ("Act") so as to permit it to choose between pursuing a civil penalty under section 901 of the Act (49 U.S.C. 1471) or a certificate action under section 609 (49 U.S.C.

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<sup>2</sup> These sections have since been recodified as sections 91.117(a) and (b), 91.123(b), and 91.13(a), respectively.

1429) for such violations.<sup>3</sup> Respondent further argues that monetary civil penalties are the only form of redress the FAA is authorized to seek for regulatory violations, and that its failure to seek such a fine from respondent in this case violated his right to due process under the United States Constitution, and his statutory (under section 901 of the Act) and Constitutional (under the Sixth Amendment) right to a jury trial.

The Administrator has filed a reply brief opposing the appeal. In his brief, the Administrator notes that many of respondent's arguments have been advanced (often by respondent's counsel) to courts of appeals in a number of other cases, and that those arguments have been uniformly rejected.<sup>4</sup>

We note, as a threshold matter, that the issues raised by respondent appear to be beyond the scope of our review. Under section 609(a) of the Act we are empowered to amend, modify, or reverse the Administrator's order of suspension only if we find that safety and the public interest do not require its affirmation. 49 U.S.C. 1429(a). See also 49 C.F.R. 821.49, setting forth the issues we will consider on appeal. As we said in Administrator v. Air San Juan, NTSB Order No. EA-3567 at 9

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<sup>3</sup> Respondent asserts that such publication and promulgation is required by sections 552(a)(1)(D) and 553 of the Administrative Procedure Act (5 U.S.C. 552(a)(1)(D) and 553).

<sup>4</sup> The Administrator cites: Rochna v. NTSB, 929 F.2d 13 (1st Cir. 1991); Hill v. NTSB, 886 F.2d 1275 (10th Cir. 1989); Tearney v. NTSB, 868 F.2d 1451 (5th Cir. 1989); Capuano v. NTSB, 843 F.2d 56 (1st Cir. 1988); Komjathy v. NTSB, 832 F.2d 1294 (D.C. Cir. 1987); Go Leasing v. NTSB, 800 F.2d 1514 (9th Cir. 1986); Roach v. NTSB, 804 F.2d 1147 (10th Cir. 1986); and Pangburn v. CAB, 311 F.2d 349 (1st Cir. 1962).

(1992), "we have long maintained that it is not our role to consider the underlying lawfulness of FAA policy. [Citing cases]." However, to the extent that it is within our jurisdiction to do so, we reject all of respondent's arguments as meritless.

In Administrator v. Komjathy, 5 NTSB 140, 142 (1986), we set forth a detailed history of section 609 and its predecessors which demonstrated that the Administrator has statutory authority, under section 609 of the Act, to suspend and revoke airman certificates for violations of the FAR, and noted that the issuance of a regulation repeating that authority is not a prerequisite to its use. The D.C. Circuit agreed, holding that there is a clear statutory basis for the FAA's policy of suspending airman certificates as a disciplinary sanction for violations of the FAR, and that there is no need to promulgate, by notice-and-comment rulemaking, the regulation (14 C.F.R. 13.19) which reiterates that statutory authority. Komjathy v. NTSB, 832 F.2d 1294, 1296 (D.C. Cir. 1987).<sup>5</sup> Similarly, in Rochna v. NTSB, 929 F.2d 13, 15 (1st Cir. 1991), the First Circuit held that the FAA was not required to promulgate or publish a rule authorizing suspension of airman certificates as sanction for FAR violations.

Furthermore, the Ninth Circuit has made clear that "there is no question that the Administrator has the legal discretion to

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<sup>5</sup> See also Hill v. NTSB, 886 F.2d 1275, 1281; Go Leasing v. NTSB, 800 F.2d 1514, 1519-21; Pangburn v. CAB, 311 F.2d 349, 354.

choose between employing section 609 certificate action and section 901 civil money penalty remedies." Go Leasing v. NTSB, 800 F.2d at 1514 1518 (9th Cir. 1986). Accordingly, there is no basis for respondent's assertion that the FAA must publish or promulgate as an "interpretation" of the Act the fact that it has this right to chose.

With regard to respondent's position that the only proper recourse the FAA had against him was a civil penalty, he ignores the many cases, cited above, which recognize the Administrator's authority to pursue a certificate action. See also Wilson v. CAB, 244 F.2d 773, 774 (D.C. Cir. 1957) (disciplinary action for FAR violations was not intended to be the exclusive province of section 901). Finally, regarding respondent's assertion that he was denied his constitutional and statutory right to a jury trial, we note that respondent has no Sixth Amendment right to a jury trial since that Constitutional guarantee, by its terms, applies only to criminal cases.<sup>6</sup> Nor did the FAA's failure to seek a civil penalty in this case deprive respondent of any statutory right to a jury trial, as the Act provides for administrative assessment of civil penalties less than \$50,000, with the right to appeal final orders of the Administrator to the courts of appeals.<sup>7</sup>

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<sup>6</sup> See Roach v. NTSB, 804 F.2d 1147, 1154-52 (certificate suspension proceeding was not criminal or quasi-criminal in nature, therefore not sufficient to implicate the Fifth Amendment's protection against compulsory self-incrimination).

<sup>7</sup> At the time of respondent's regulatory violations, administrative assessment of civil penalties was authorized by

In sum, respondent has presented no reason to disturb the law judge's initial decision in this case.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 90-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.<sup>8</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

(..continued)

the Civil Penalty Assessment Demonstration Program, then codified at 49 U.S.C. 1475. The authority has since been made permanent, and now appears at 49 U.S.C. 1471(a)(3).

<sup>8</sup> For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).